

BEFORE THE
SPECIAL EDUCATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2007020739

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, State of California Office of Administrative Hearings, Special Education Division (OAH), heard this matter on March 29, 2007, in Los Angeles, California.

Los Angeles Unified School District (LAUSD) was represented at hearing by Susan Park, an attorney with Fagen, Friedman & Fulfroost. Also present was LAUSD Due Process Specialist Joyce Kantor.

No appearance was made by or on behalf of Student or her mother (Parent), and neither Student nor her Parent appeared, testified, or presented any evidence.¹

On February 26, 2007, Los Angeles Unified School District (LAUSD) filed a request for a due process hearing complaint (complaint)² regarding Student. At the hearing, witness testimony and documentary evidence were received. District made an oral closing argument, the record was closed, and the matter was submitted on March 29, 2007.

¹ See the Procedural Matters section of this decision regarding Student's request(s) for a continuance of the hearing.

² A request for a due process hearing under California Education Code section 56502 is the due process complaint notice required under title 20 United States Code section 1415(b)(7)(A).

ISSUE

Does District have the right to assess Student in the absence of parental consent?

CONTENTIONS OF THE PARTIES

LAUSD contends that Parent consented to two out of three proposed assessment areas in LAUSD's December 2006 assessment plan (the health and career areas), and that Parent refused to consent to LAUSD's proposed academic performance assessment of Student in that plan. LAUSD contends that Parent has failed or refused to consent to its February 2007 assessment plan, which includes proposed assessments in the areas of academic performance, general ability, language function, motor abilities, and social-emotional status. LAUSD contends that it has taken reasonable measures to obtain Parent's consent for the assessments after proper notice and advisement of rights. Student did not participate in the hearing.

PROCEDURAL MATTERS

On February 26, 2007, LAUSD served a copy of the complaint on Parent at her address of record with the District. On February 27, 2007, OAH served a Notice of Due Process Hearing and Mediation on both the school district and Parent at their respective addresses of record. The Notice set the due process hearing herein for March 29, 2007, at 9:30 a.m., at LAUSD offices, located at 333 S. Beaudry Ave., 17th Floor, Los Angeles, California 90017.

On Thursday, March 22, 2007, Parent filed a request for a continuance of the hearing, based on unspecified "medical reasons." On Friday, March 23, 2007, OAH issued an order setting a telephonic prehearing conference for Monday, March 26, 2007, at 1:30 p.m., and a second order deferring ruling on Parent's motion for a continuance until the prehearing conference. The order stated that more information was needed to rule on the motion.

On March 26, 2007, during the prehearing conference, ALJ Johnson denied Parent's request for a continuance of the hearing without prejudice. As set forth in the Order Following Prehearing Conference and Denying Continuance,³ Parent did not participate in the prehearing conference after an initial telephone call, and Parent did not provide sufficient specific information to support a motion for a continuance. The order stated that Parent could renew the motion to provide such information.

On March 29, 2007, at the time and place of hearing, Parent did not appear. Parent did not make any further motion for a continuance of the hearing. The attorney for LAUSD, Susan Park, represented that at about 3:44 p.m. on March 28, 2007, she received a telephone

³ The OAH orders described in Factual Findings 2 and 3 were served on District by fax and on Parent by express overnight mail.

message from a person identified as Jovan Di Sargent (spelled phonetically), calling on behalf of a Dr. Herbert Kornfeld, stating that both Parent and Student were ill, and that a letter to that effect was drafted and would be faxed. The nature of any illness was not specified. Twice, at about 4:15 and 4:25 p.m., on March 28, Ms. Park returned the call, and was connected with an answering service. Ms. Park was informed that Ms. Di Sargent was an “office girl.” Ms. Park left her phone number. As of the beginning of the hearing on March 29, Ms. Park had not received any fax, or any further message from, or on behalf of Parent. To the extent that the March 28 telephone message from Ms. Di Sargent to Ms. Park could be construed as a request for a continuance on behalf of the Student, the motion was denied for failure to establish good cause.

During the hearing, a school counselor with Hamilton High School, LAUSD, Sherymaria Makkar, testified that she returned Parent’s telephone call at about 3:28 p.m. on March 28, 2007. Ms. Makkar was informed by Parent that Parent would not attend the hearing because Student was ill. Parent did not tell Ms. Makkar that Parent was ill.⁴ Ms. Makkar was not informed of the nature of the alleged illness.

At the end of the hearing on March 29, 2007, Ms. Park checked for messages and faxes, and reported a new telephone message from Ms. Di Sargent, again reiterating that both Parent and Student were ill. The nature of any particular illness was not specified. At approximately 11:15 a.m., Ms. Park returned the call and informed Ms. Di Sargent that the call was on the speaker phone, and on the record at the hearing with ALJ Johnson. Ms. Di Sargent indicated that she was not authorized to disclose a medical diagnosis. She was waiting for Parent to fax a consent to release medical information, which she had not yet received. To the extent that the March 29 telephone message from Ms. Di Sargent to Ms. Park could be construed as a request for a continuance on behalf of the Student, the motion was denied for failure to establish good cause.

FACTUAL FINDINGS

Background

1. Student is 16 years old, and lives with Parent within the boundaries of LAUSD. She attends 11th grade at Alexander Hamilton High School (Hamilton), a public school in the LAUSD.

2. Student was born in 1989. According to LAUSD’s records, Student’s health history includes a diagnosis of sickle cell anemia and gallstones.

⁴ Parent’s topic of concern in the telephone conversation with Ms. Makkar was obtaining signatures on documents to withdraw Student from Hamilton.

3. Prior to the 2005-2006 school year, Student lived within the boundaries of, and attended a school within the ABC Unified School District (ABCUSD). At least as of February 2005, ABCUSD had provided Student with a 504 Individual Accommodation Plan (504 Plan), pursuant to the federal Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. Student's 504 Plan for ninth grade at Gahr High School in the ABCUSD provided her with accommodations based on a diagnosis of sickle cell anemia.

4. In June 2005, ABCUSD proposed an individualized education program (IEP) for Student.⁵ The IEP proposed that Student would be eligible for special education services from ABCUSD under the category of Other Health Impaired (OHI). The IEP offer was executed by Kathleen A. Cronin, Special Education Supervisor, on June 16, 2005. The proposed IEP refers to a prior settlement agreement. The IEP notes indicated that Parent attended an IEP meeting with ABCUSD personnel on June 16, 2005, but that Parent refused to sign either the attendance or the consent pages.

5. When Student transferred into the boundaries of LAUSD in about September 2005, Parent enrolled Student in Westchester High School, a public school within the District's boundaries. The enrollment form shows that Parent claimed that Student was eligible for special education and related services, and that Student had an IEP from Gahr High School. However, Parent gave Westchester High School Student's 504 Plan from ABCUSD. A copy of Student's 504 Plan was routed to pertinent school staff.

6. For the 2006-2007 school year, Parent attempted to enroll Student in Hamilton High School within the LAUSD in late August 2006. Parent again claimed that Student was eligible for special education and related services, and that Student had an IEP from Gahr High School. Parent became upset in dealing with a clerk at Hamilton about Student's 504 Plan. Special Education Coordinator Giselle Khazzaka was called to speak with Parent. Ms. Khazzaka met with Parent. Parent had Student's 504 Plan from ABCUSD with her and showed it to Ms. Khazzaka. Ms. Khazzaka informed Parent that the 504 Plan did not involve special education services. Parent did not complete the enrollment packet.

7. LAUSD Assistant Principal Sharon Greene of Hamilton High School then met with Parent. Parent insisted that Student was eligible for special education services, and claimed to be in litigation with ABCUSD regarding those services. Ms. Greene telephoned ABCUSD and spoke with Kathleen Cronin. Ms. Cronin informed Ms. Greene that ABCUSD had not completed its assessments of Student regarding eligibility for special education services because Parent had not cooperated to consent to their assessment plans, and that ABCUSD's IEP offer was contingent on completion of assessments. Parent faxed Ms. Greene a copy of ABCUSD's IEP offer, which was not signed by Parent, either for attendance or consent. Ms. Greene determined that Student did not have a pre-existing eligibility determination for special education services.

⁵ See California Education Code section 56345.

8. Student completed enrollment to attend Hamilton High School on September 21, 2006. A copy of Student's 504 Plan from ABCUSD was routed to pertinent school staff.

District's December 2006 Proposed Assessment Plan

9. A school district must provide a full and individual evaluation before special education services are initially provided to a child. A school district is required to assess a child in all areas of suspected disability, including, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status.

10. On September 8, 2006, prior to completion of Student's enrollment at Hamilton, Parent filed with OAH a special education request for a due process hearing on behalf of Student, bearing OAH Case No. N2006090199, involving both ABCUSD and LAUSD. In connection with that case, a resolution session was held between Parent and LAUSD on or about November 21, 2006. LAUSD Due Process Specialist Joyce Kantor, Hamilton Assistant Principal Sharon Greene, Hamilton school counselor Sherymaria Makkar, Parent, and an advocate for Parent, Rodney Ford, were present.

11. During the November 2006 resolution session, LAUSD personnel explained to Parent their need to assess Student to determine her eligibility for special education services. Parent and her advocate took a draft assessment plan form with them in order to review it, but never returned it. On December 7, 2006, LAUSD sent Parent a formal assessment plan form for Parent's consent. Consistent with the assessment offer made during the resolution session, LAUSD offered to assess Student in the areas of health and development, including vision and hearing; academic performance; and career and vocational abilities/interests. The plan proposed that the health assessment would be completed by a nurse or physician, and the other two assessments would be done by a special education teacher. Enclosed with the December 2006 assessment plan was a copy of "A Parent's Guide to Special Education Services (Including Procedural Rights and Safeguards)."

12. On January 11, 2007, LAUSD received the December 2006 assessment plan back, signed by Parent and dated January 8, 2007. Parent's signature includes a checkmark in a circle next to the following pre-printed phrase: "YES, I consent to the Assessment Plan except in the following area(s): ..." ⁶ Printed by hand next to this phrase and above Parent's signature is the following: "IEP TESTING HAS TO BE DONE BY ABC UNIFIED SCHOOL DISTRICT." Parent did not provide any written reason for wanting ABCUSD to test Student's 2007 levels of academic performance, when ABCUSD had not taught Student since spring 2005.

⁶ The other two pre-printed choices on the form were: "YES, I consent to the Assessment Plan" and "NO, I do not consent to the Assessment Plan."

13. LAUSD personnel spoke with Parent and concluded that Parent's reference to "IEP testing" meant the academic performance testing. LAUSD determined that, by virtue of Parent's qualified signature as found in Factual Findings 12 above, Parent consented to District's health and career assessments, but did not consent to District's offer to assess Student's academic performance.

14. District began its health assessment of Student on January 23, 2007. Hamilton health nurse Linda Luther, a registered nurse, interviewed Parent by telephone, reviewed available health records, and began a modified physical assessment of Student. Student has not rescheduled an audiometric screening. The health assessment has not been completed. Parent's cooperation with the commencement of the health assessment is consistent with District's understanding that Parent consented to the health assessment.

District's February 2007 Proposed Assessment Plan

15. In February 2007, LAUSD provided an additional assessment plan to establish Student's baseline information in more areas related to her suspected disability.⁷ On February 6, 2007, Ms. Greene sent a letter to Parent along with the additional proposed assessment plan, and another copy of LAUSD's guide for parents and advisement of procedural rights and safeguards. Ms. Greene explained to Parent in the letter that LAUSD requested consent to conduct an academic performance assessment of Student, and requested that Parent consent to additional areas of assessment as follows: general ability, language function, motor abilities, and social-emotional status. The plan proposed that the academic performance assessment would be conducted by a special education teacher, and the other new areas would be assessed by a psychologist. Since Parent had already consented to the health and career assessments in the December 2006 assessment plan, those areas were not included in the new 2007 assessment plan.

16. Ms. Green's February 2007 letter further advised Parent that if Parent chose not to consent or failed to respond to the request to provide consent within 15 days, pursuant to California Education Code section 56321(c), LAUSD might pursue the matter by filing a request for a due process hearing.

17. On February 26, 2007, LAUSD filed with OAH its request for a due process hearing. On March 8, 2007, Susan Park, attorney for LAUSD, mailed Parent a letter with another copy of the February 2007 assessment plan and invited Parent's consent in advance of a March 14 mediation date. Parent has not submitted any written consent to the plan.

18. The 2006 assessment plan remains in effect pursuant to Parent's qualified consent, as found in Factual Findings 12 and 13 above. LAUSD has not conducted the career assessment for Student yet, because it plans to have that area assessed by the same

⁷ Although not an issue in this case, LAUSD's December 2006 proposed assessment plan did not address assessment in all areas related to Student's suspected disability.

special education teacher who would conduct Student's academic performance assessment. LAUSD's December 2006 assessment plan does not need to be enforced by OAH in this proceeding because Parent consented to the health and career assessments, and LAUSD again proposed to do an academic performance assessment as part of the February 2007 assessment plan. No other assessments have been commenced or completed under either assessment plan.

19. Both the December 2006 and February 2007 assessment plans were duly served on Parent with written notice of parental rights and an explanation of procedural safeguards that are required by law. Both proposed assessment plans were understandable, in English, Parent's language, and explained the general types of assessments that were proposed.

20. LAUSD's assessments pursuant to the December 2006 and February 2007 assessment plans would use multiple standardized tests and tools, and would be conducted by qualified school district personnel. LAUSD was obligated to conduct its own assessments of Student, and could not legally comply with Parent's demand that ABCUSD conduct an academic performance assessment of Student. LAUSD has the right and obligation to determine which of its competent personnel would conduct the assessments.

21. LAUSD has a valid concern that Student should be assessed for eligibility for special education and related services. In addition to the Parent's express request for special education services, LAUSD's records show that Student has numerous tardies to certain class periods, and absences from class periods, as well as school days, and that she has suffered low or failing grades in some subjects. Ms. Makkar meets informally with Student about once a week. Ms. Makkar is concerned about Student's unusually high number of unexplained or "uncleared" absences, without parental explanation. Parent has informed Ms. Makkar that Student takes medications that have made it difficult for her to get up in the morning. LAUSD has made Student's first period a "home period" instead of an academic subject class to accommodate her tardiness. LAUSD has sufficient information from Parent and from Student's attendance and grade problems to support the appropriateness of assessing Student. The school district's personnel plan to evaluate all pertinent information in order to assess Student, and to present the assessment results to an IEP team meeting, including Parent, so that the IEP team would be able to make an eligibility determination.

22. The evaluation of Student's eligibility is not an issue in the present case. However, sickle cell anemia may qualify a student as eligible for special education and related services under the OHI category, provided that it is shown to result in a student's limited strength, vitality or alertness due to a chronic or acute health problem, not temporary in nature, and provided that it is shown to adversely affect a student's educational performance.

23. Parent's failure or refusal to consent to Student's assessments in the proposed areas listed in the February 2007 assessment plan has continued to the date of the hearing herein. LAUSD has shown that it has taken reasonable measures to obtain Parent's consent.

LEGAL CONCLUSIONS

Applicable Law and Determination of Issues

1. LAUSD, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) Areas of suspected disability include, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

3. Sickle cell anemia may qualify a student as eligible for special education and related services under the OHI category, provided that it is shown to result in a student's limited strength, vitality or alertness due to a chronic or acute health problem, not temporary in nature, and provided that it is shown to adversely affect a student's educational performance. (34 C.F.R. § 300.8(a), (c)(9); Cal. Code Regs., tit. 5, § 3030(f).)

4. As found in Factual Findings 2, 3, and 22, Student's diagnosis of sickle cell anemia qualifies to meet one aspect of the eligibility criteria in Legal Conclusions 3 above. Assessments would be appropriate to evaluate the other aspects of the criteria.

5. As found in Factual Findings 9, 11, 15, 18, 19, and 20, both of LAUSD's assessment plans, taken together, proposed to assess Student in most if not all areas related to her suspected disability, and would involve the use of multiple standardized tests and tools.

6. The assessment plan must be accompanied by a notice of the parent's rights and a written explanation of the procedural safeguards under IDEA 2004 and California law. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c).) Consent for initial assessment may not be construed as consent for any initial placement or provision of services. (Ed. Code, § 56321, subd. (e).)

7. As found in Factual Findings 11, 12, 13, 15, 16, and 17, both the December 2006 assessment plan and the February 2007 assessment plan were properly sent to Parent along with written notice of parental rights and an explanation of procedural safeguards. Parent was given from November 21, 2006, through January 8, 2007, to respond to the December 2006 plan, and was given more than 15 days to respond to the February 2007

assessment plan, from February 6, 2007, to February 26, 2007, when District filed its request for a due process hearing.

8. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).) Assessments must be conducted by individuals who are knowledgeable and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, §§ 56320, subd. (g), 56322.)

9. As found in Factual Findings 11, 14, 15, and 20, LAUSD’s December 2006 and February 2007 proposed assessments meet the requirements in Legal Conclusions 8 above, because they would be conducted by qualified LAUSD personnel: a registered nurse, a special education teacher, and a psychologist. LAUSD was and is obligated to conduct its own assessments of Student, and could not legally comply with Parent’s demand that ABCUSD conduct an academic performance assessment of Student.

10 While the law provides that a local educational agency (LEA) has the right and obligation to conduct assessments, parental consent is generally required before a school district may conduct assessments. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321, subd. (c).)⁸

11. As found in Factual Findings 12, 13, 14, 16, and 23, Parent consented to two areas of assessment in the December 2006 plan, refused to consent to an academic performance assessment to be conducted by LAUSD, and has failed or refused to consent to any of the proposed areas of assessment in the February 2007 plan.

12. An LEA can override a lack of parental consent if the LEA prevails at a due process hearing. (20 U.S.C. § 1414(a)(1)(C)(ii); Ed. Code, § 56506, subd. (e).) The LEA must demonstrate at hearing that it has taken reasonable measures to obtain the consent of the parent, and that the child’s parent has failed to respond. (Ed. Code, § 56506, subd. (e).)

13. As found in Factual Findings 11, 12, 15, 16, and 17, and Legal Conclusions 7 above, LAUSD personnel met with Parent and her advocate in November 2006, and explained the need for assessments. They provided Parent with a draft assessment at that meeting, and duly served Parent with the December 2006 assessment plan, and the February 2007 assessment plan. LAUSD provided Parent with sufficient time within which to consent, and its attorney sent another copy of the February 2007 assessment plan to Parent in March 2007. LAUSD has met its burden of proof to establish that it has taken reasonable measures to obtain the consent of Parent.

⁸ A parent has the right to obtain an independent educational assessment of the student at public expense if the parent disagrees with an assessment obtained by the public agency and other factors are met, including a finding that the public agency’s assessment was not appropriate. (Ed. Code, § 56329, subd. (b).)

14. As found in Factual Findings 18, LAUSD's December 2006 assessment plan does not need to be enforced by OAH in this proceeding because Parent consented to the health and career assessments, and LAUSD again proposed to do an academic performance assessment as part of the February 2007 assessment plan.

15. As found in Factual Findings 2, 3, 4, 5, 6, 7, 14, 21, and 22, LAUSD has valid concerns that Student should be assessed based on Parent's request for special education and related services, and Student's reported diagnosis, attendance, and grades. In *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1315, the Ninth Circuit Court of Appeals held that "if the parents want Gregory to receive special education under the Act, they are obligated to permit such testing." Likewise, the court in *Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 53, held that "there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA."

ORDER

1. Los Angeles Unified School District may conduct assessments of Student pursuant to the proposed assessment plan of February 2007.

2. If Parent wants Student to receive special education and related services from Los Angeles Unified School District, Parent shall make Student reasonably available for the assessments.

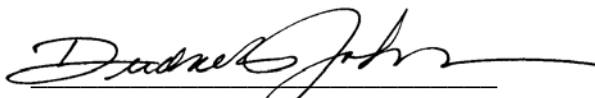
PREVAILING PARTY

Los Angeles Unified School District prevailed on the only issue for hearing in this case. (Ed. Code, § 56507, subd. (d).)

NOTICE OF APPEAL RIGHTS

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: April 9, 2007



DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division